IN THE

Supreme Court of the United States

October Term, 1957

No. 382

THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,
Petitioner;

vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM, COUNTY OF LOS ANGELES TAX COLLECTOR, and JOHN R. QUINN, COUNTY OF LOS ANGELES ASSESSOR.

No. 385

VALLEY UNITARIAN—UNIVERSALIST CHURCH, INC.,
Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR.

PETITIONERS' CONSOLIDATED OPENING BRIEF.[1]

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Opinions Below.

In No. 382, the trial court rendered no written opinion. In No. 385, the opinion of the trial court, dictated orally from the bench, appears in the record at R.V. 12-18. It is

[1]The two cases were consolidated by order of this Court. [R.F. 90; R.V. 22.] References to the record in No. 382, the First Unitarian Church case, will be: R.F. References to the record in No. 385, the Valley Unitarian—Universalist Church case, will be: R.V. By order of this Court [R.V. 23], the name of the petitioner in the caption of No. 382 was changed from Peoples' Church of San Fernando Valley, Inc., as it was designated in the petition for writ of certiorari, to its present form because the name of the church had been changed subsequent to the start of this litigation.

not reported. The opinions of the court below [R.F. 35; R.V. 20] are reported in 48 Cal. 2d 419 and 899, 311 P. 2d 508 and 540; the opinions of the dissenting justices in the court below [R.F. 57, 65; R.V. 21, 22] are reported in 48 Cal. 2d at 443, 451 and 900, 311 P. 2d at 522, 527 and 542.

Jurisdiction.

These are reviews of judgments [R.F. 57; R.V. 21] of the Supreme Court of the State of California in civil cases entered on April 24, 1957 [R.F. 35; R.V. 20]. Timely filed [R.F. 89; R.V. 22] petitions for rehearing were denied on May 22, 1957 [R.F. 89; R.V. 22], Chief Justice Gibson and Justices Carter and Traynor being of the opinion that the petitions should be granted [*ibid*].

Jurisdiction of this court is invoked under 28 U. S. C. 1257(3). The petitions for writs of certiorari were timely filed (Rule 22[3], this court; 28 U. S. C. 2101(c)), on August 19 and 20, 1957 [R.F. and V, cover pages]. This court granted certiorari on October 21, 1957 [R.F. 90; R.V. 22].

Constitutional Provisions and Statutes Involved.

Only the citations of the constitutional and statutory provisions are included here. The full text is set forth in Appendix A attached hereto. The citations are as follows:

California Church exemption:

Cal. Const., Art. XIII, Sec. 1½;

California Church Loyalty Oath:

Cal. Rev. and Tax. Code, Sec. 32 (Cal. Stats. 1953, ch. 1503, p. 3114, Sec. 1);

California Church non-exemption provision based on advocacy:

Cal. Const., Art. XX, Sec. 19(b);

U. S. Const., 1st Amend.;

U. S. Const., 14th Amend., Sec. 1;

U. S. Const., Art. VI, Cl. 2.

Questions Presented for Review.

1. Does Section 32 of California Revenue and Taxation Code (Cal. Stats. 1953, ch. 1503, p. 3114, Sec. 1) which takes away the traditional tax exemption from a church which does not sign an oath reading that it

> does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in event of hostilities

on its face, and as construed and applied to the petitioning churches, violate:

(a) the freedom of religion, speech or assembly guarantees of the 1st and 14th Amendments to the Constitution; or

(b) the due process clause of the 14th Amendment to the Constitution; or

(c) the equal protection clause of the 14th Amendment?

2. Does Article XX, Section 19(b) of the California Constitution which takes away the traditional tax exemption from a church "which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the

support of a foreign Government against the United States in the event of hostilities," on its face, and as construed and applied to the petitioning churches violate federal constitutional rights as set forth above as to Section 32?

3. Do said Section 32 of the California Revenue and Taxation Code and/or Article XX, Section 19(b) of the California Constitution on their face and as construed and applied to the petitioning churches violate the supremacy clause, Article VI, Clause 2, of the Constitution?

Statement of the Case.

The facts are not in dispute, the allegations in the complaints [R.F. 1-32; R.V. 1-7] being admitted by the general demurrers [R.F. 33; R.V. 7-8] and, in No. 382, by respondents' stipulation [R.V. 19] that they do not contravert any of the allegations of fact in the complaint.

Petitioners are churches [R.F. 1; R.V. 1]. Respondents are the taxing bodies and tax authorities [R.F. 1-2; R.V. 1-2] of the area in which are located real property and the church buildings thereon owned by petitioners [R.F. 2, 7 R.V. 2]. Said property is used solely and exclusively for religious worship [R.F. 2, 7; R.V. 2]. Under Article XIII, Section 1½ of the California Constitution, by reason of said sole and exclusive use for religious worship, said property is entitled to tax exemption [R.F. 3, 8; R.V. 2]. Respondents refused to allow petitioners the church tax exemption [R.F. 4, 9; R.V. 3] not because the churches did, nor even because respondents claim they did, advocate either of the doctrines proscribed by Article XX, Section 19 of the California Constitution [R.F. 56],

but solely because petitioners struck out and refused to execute that part of the tax form [R.V. 19] which required the oath as to non-advocacy mentioned in Section 32 of the California Revenue and Taxation Code [R.F. 3-4, 8; R.V. 3]. Respondents thereupon demanded payment of the taxes [R.F. 4, 9; R.V. 3].

Thereafter, pursuant to the provisions of California law (Rev. & Tax. Code, Secs. 5136-5137) for testing the validity of taxes assessed, petitioners paid the taxes under protest [R.F. 4, 9; R.V. 4], claiming that the state constitutional provision (Art. XX, Sec. 19(b)) and the legislative section (Rev. & Tax Code, Sec. 32) requiring the oath of non-advocacy as a condition of tax exemption, were violative, *inter alia,* of the various federal constitutional guarantees heretofore set forth [R.F. 5-6, 10-11; R.V. 4]. Included in the "Protest of Tax Payment" filed by petitioner in No. 382 was the statement of one of the principles of the church [R.F. 14, 23]:

> "The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs."

Thereafter, as provided by California law (Rev. & Tax. Code, Secs. 5138-5139), these suits were filed for recovery of the taxes thus paid under protest and for declaratory judgment to the effect that the denial of the church tax exemption to petitioners was illegal and void [R.F. 12; R.V. 4].

The trial court in No. 382 sustained respondents' demurrer without leave to amend and entered judgment for respondents dismissing the action [R.F. 34]. In No 385, the trial court ruled against petitioner on the federal questions [R.V. 13], but entered judgment in favor of petitioner [R.V. 10], on a state ground [R. 17] and ordered refund of the taxes paid [R. 10].

On appeal the court below, 4-3, affirmed No. 382 [R.F. 57] and by the same vote reversed No. 385 [R.V. 21]. Chief Justice Gibson and Justice Traynor, dissenting, disagreed, stating [R.F. 57; R.V. 21]: "Section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech." Justice Carter, in separate dissenting opinions [R.F. 65; R.V. 22] held that the oath violated the equal protection clause of the 14th Amendment as well as the guarantee of freedom of speech, and by his reliance upon Jefferson's statement that "Rebellion to Tyrants is Obedience to God," the guarantee of freedom of religion as well.

Summary of Argument.

1. The provisions here involved violate the due process clause of the 14th Amendment on a number of grounds.

The advocacy that is proscribed is couched in language that is too vague and indefinite to withstand constitutional due process attack.

Free speech is abridged because the danger to the legitimate interest the state has a right to protect is far outweighed by the interest involved in permitting the speech.

Additionally the court below, contrary to decisions of this Court, has construed the provisions prohibiting advocacy of overthrow of the government by force and violence so as to prohibit mere advocacy of doctrine and did not confine the statute within the necessary constitutional limits permitting only proscription of incitement to action. In short, California has penalized views, by means of the tax penalty, not because of any danger to the state, but because the views are disapproved of.

The oath violates freedom of religion by compelling the church, on pain of loss of tax exemption, to confess as to its non-advocacy. This breaches the Wall of Separation because the state has no right to require any confession of faith from a church; it exacts a price from churches which refuse to follow state orthodoxy and rewards churches which do. Moreover, the oath here is essentially the same as the historic English test oaths whose demise it was thought the First Amendment had accomplished. And in compelling the church by oath to give up its right of moral judgment, the state has unconstitutionally invaded the sphere of the intellect and spirit.

The provisions here attacked also violate due process in ways in addition to vagueness. They are arbitrary in that there is no danger to the state which requires that free speech be impinged upon. Moreover, the means adopted (abjuration of advocacy) have no relationship to the end sought (the raising of revenue). Even assuming the primary purpose of the oath to be the protection of the state from possible overthrow, the means chosen bear no reason-

able relationship to that end. If history teaches anything, such means actually increase the danger to the state, as suppression of free discussion necessarily renders it less probable that those entertaining false views will have the chance to hear such views challenged in free debate and to hear true and correct views expressed. Likewise, innocent with knowing activity have been lumped together and penalized. Due process does not permit this indiscriminate classification. The oath creates a conclusive presumption of guilt, a procedure which itself is arbitrary.

Equal protection is also offended, because the classification (unpopular advocacy vs. property taxes) have no reasonable relationship to each other.

2. The Federal Supremacy Clause has been violated because (a) in the matter of advocacy of overthrow, the Congressional plan has left no room for state implementation, (b) the field, especially of advocacy of support of a foreign government against the United States during war time, is so closely a matter of Federal concern as to preclude state enforcement on the subject and (c) state enforcement presents a serious danger of conflict with the federal program—the very thing that happened here.

ARGUMENT.

I.

Section 19(b) of Article XX of the California Constitution and Section 32 of the California Revenue and Taxation Code Violate the 14th Amendment to the United States Constitution.[2]

A. The Provisions Offend Due Process Because They Are Vague, Indefinite and Uncertain.

The phrase "does not advocate the support of a foreign government against the United States in (the)[3] event of hostilities" does not have the preciseness of meaning, the clarity of import which a statute, admittedly dealing in the field of, restricting, and penalizing free speech, must have. It does not tell the reader what he may advocate and what he may not. It offends, therefore, against the "vice of vagueness" principle.[4]

It is impossible for a minister in reading the phrase to be able to tell, in order that his church not be penalized by loss of tax exemption, what he may or may not say.

Does the phrase, for example, cover a Rabbi, during the recent hostilities in Egypt, preaching that England was right in her actions and that the United States was wrong

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[2]For ease of reference, the state constitutional provision will be referred to as Article XX, and the state statute as Section 32.

[3]The statute does not contain the article.

[4]*Winters v. New York,* 333 U. S. 507; *Lanzetta v. New Jersey,* 306 U. S. 451; *United States v. Cardiff,* 344 U. S. 174; *Thornhill v. Alabama,* 310 U. S. 88; *Hague v. CIO,* 307 U. S. 496; *Burstyn v. Wilson,* 343 U. S. 494; *Herndon v. Lowry,* 301 U. S. 242; *Connally v. General Construction Co.,* 269 U. S. 385; *Champlin Refining Co. v. Commission,* 286 U. S. 210; *United States v. L. Cohen Grocery Co.,* 255 U. S. 81; *Stromberg v. California,* 283 U. S. 359; *cf. Watkins v. United States,* 354 U. S. 178.

in condemning her? Does the phrase cover this same Rabbi's advocating that all moral support be given to Israel and that weapons be sent her despite the fact that the United States had banned such shipments? Does it proscribe, on pain of loss of tax exemption, a Catholic priest's advocating from his pulpit that in the event the United States, without provocation, attacks and takes over the Vatican, that such action was improper and that the United States should leave? Some Americans advocate the admission of Communist China to the United Nations (Address by Professor Louis B. Sohn before Los Angeles Town Hall, July 23, 1957 [19 Town Hall Bulletin, No. 31, Aug. 6, 1957]). Does the situation extant between Communist China and Nationalist China come within the meaning of the word "hostilities"? If so, is such advocacy forbidden? During the Korean conflict, Quakers advocated loving and feeding our enemies in North Korea (*The Churchman,* April 1, 1954, p. 6). Does such advocacy come within the prohibition? Does the phrase interdict only the formal charter or pronouncements of the corporate church body? Or are only the minister's utterances proscribed? Or is he exempt? Does the phrase outlaw advocacy of moral support? Or financial? Or just physical? Is only wartime advocacy condemned or is peacetime advocacy with reference to what should be done during hostilities (whatever they may be) if ever they break out, and no matter how remote, and no matter between what countries, likewise condemned? What is meant by "against the United States"? Is a position contrary to, or in criticism of, a policy enunciated by the Secretary of State or the President or Congress, "against the United States"?

A reading of the phrase gives no answer to these questions. Nor does the phrase come here clothed with an

authoritative narrow state interpretation. (*Cf., Cox v. New Hampshire,* 312 U. S. 569, 575; *Kingsley Books v. Brown,* 354 U. S. 436.) The statute does not narrowly define its terms, nor does the legislative histor[5] Though requested, the court below refused to construe the phrase narrowly, saying only [R.F. 40]:

> "Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions."

The phrase is not, therefore, like "overthrow of the government by force and violence" which the courts have construed and narrowly defined (*American Communications Association v. Douds,* 339 U. S. 382; *Dennis v. United States,* 341 U. S. 494; *Yates v. United States,* 354 U. S. 298). Even as to this latter phrase, *cf., Sweezy v. New Hampshire,* 354 U. S. 234, holding as too broad because too remote, a definition of a "subversive person," as being one who "by any means aids in the commission of any act intended to assist in the alteration of the constitutional form of government by force or violence." And *cf.,* Mr. Justice Frankfurter, in *American Communication Association v. Douds,* 339 U. S. 382, 420, dissenting from that part of the opinion upholding an oath that one "does not believe in, and is not a member of or supports any organization that believes in . . . the overthrow of the

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[5]The official arguments presented to the voters when Article XX was voted upon, said nothing which gave any meaning to the phrase here being discussed. The pamphlet containing these arguments (it is entitled: "Proposed Amendments to Constitution—Propositions and Proposed Laws together with arguments—to be submitted to the electors of the State of California at the General Election—Tuesday, Nov. 4, 1952") has, for the convenience of the Court, been lodged with the Clerk. Article XX was submitted as Proposition 5. The arguments appear on pages 6 and 7 of the document.

United States Government . . . by any illegal or unconstitutional means." He said:

> "It is asking more than rightfully may be asked of ordinary men to take oath that a method is not 'unconstitutional' or 'illegal' when constitutionality or legality is frequently determined by this Court by the chance of a single vote."

In the latter case of *Osman v. Douds,* 339 U. S. 846, this Court was equally divided as to the validity of that phase of the avowal. The provisions here involved contain virtually the same phraseology: "or other unlawful means."

In the face of the language of the provisions at bar as to either of the proscribed advocacies, the only way the church can be sure that its exemption will not be taken away is to submit its sermons or its doctrines to the tax assessor to get a license, so to speak, in advance. (*Cf., Staub v. City of Baxley,* 355 U. S. ....., 26 Law Week 4079.) And since a statute such as this is normally enforced during periods of strong feeling, the safest thing to do is not to advocate at all.

B. The Provisions Abridge the Right to Freedom of Speech.

The majority in the court below acknowledged that the provisions here involved infringed upon the right of free speech but asserted that such infringement was permissible and not unconstitutional. It becomes necessary, therefore, as the majority below correctly pointed out [R.F. 51] to balance the conflict of interests involved—that of the right of the individual "to speak out as against the harm or injury society may suffer as a result of such

speech" [ibid].[6] But it is in the balancing of this conflict of interests that the majority below erred.

In sustaining the validity of Article XX against constitutional attack on free speech grounds, the majority considered the state interest to be protected as being [R.F. 46] "merely a declaration of state policy with reference to its own tax structure" to the end that [R.F. 41] owners of property in the state who engage in advocacy of the overthrow of the government by force and violence[7] shall have withheld from them the benefits of tax exemption. The majority took pains to point out [R.F. 46] that the Article prescribes no penal sanctions.[8] Thus even in the majority's own view there is no danger to the State. The provision is simply a penalty in the form of increased taxes imposed upon those who advocate the proscribed doctrine. There is not even a suggestion that there is a danger to the tax structure from the disapproved advocacy or

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[6]This is not to say that the Meiklejohn absolutist position (see Justice Frankfurter, concurring, in *Dennis v. United States*, 341 U. S. 494, 525, n. 5) must necessarily be placed in limbo. But since in these cases the interest in protecting free speech so far outweighs any interest which can be cited in support of suppressing it, the "weighing of competing interests" approach will sustain petitioners and call for reversal of the court below.

[7]Completely disregarded is the second phrase of the Article having to do with advocacy of support, etc.

[8]From the standpoint of constitutionality, the fact that the penalty imposed here is in the form of a tax rather than penal is of no significance. A state may not, in the form of a tax, suppress the exercise of free speech any more than it can suppress it in the form of making the speech a crime. (*Murdock v. Pennsylvania*, 319 U. S. 105, 116.) "(I)n passing upon constitutional questions the court has regard to substance and not to mere form." (*Near v. Minnesota*, 283 U. S. 697, 708.) Moreover the oath provision does contain serious felony penal sanctions. A fact which makes it even more vulnerable under the "vice of vagueness" argument heretofore made.

what the harm to the tax structure would be if the advocates were given the exemption.

In justifying the restriction on free speech as against the public policy of the tax structure, the majority below said [R.F. 41] that the censured advocacy was illegal under the Smith Act (54 Stat. part I, p. 670). But it is clear that the justices misunderstood, just as did the trial court in *Yates v. United States,* 354 U. S. 298, what this Court had said in *Dennis v. United States,* 341 U. S. 494. In quoting from the trial court's instruction which this Court upheld in *Dennis,* the majority below omitted that portion of it having to do with "incitement to action."[9]

Thus the "advocacy of the overthrow of the government" phrase of Article XX comes to this Court with an authoritative state construction that mere abstract advocacy, short of incitement to action, is without constitutional free speech protection. That this construction is contrary to *Dennis* and *Yates* is clear.

The dissents made no such error.

Chief Justice Gibson and Justice Traynor said [R.F. 60]:

> "The state provisions in question penalize advocacy in a totally different context from that in the Dennis case. The penalty falls indiscriminately on all manner of advocacy, *whether it be a call to action or mere theoretical prophecy* that leaves the way open for counter-advocacy by others. . . ." (Italics added.)

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[9]The majority's view of the instruction was as follows [R.F. 53]:

> ". . . if the defendants actively advocated governmental overthrow by force and violence as speedily as circumstances would permit, then as a matter of law . . . there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution.' . . ."

And Justice Carter said [R.F. 83]:

> "A reading of the majority opinion leaves in the minds of the reader the implication that the 'clear and present danger' rule was abrogated by the later case of *Dennis v. United States,* 341 U. S. 494 [71 S. Ct. 857, 95 L. Ed. 1137]. In the Dennis case it was specifically noted by the court that in the Smith Act 'Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity *in which the evidence showed these petitioners engaged.*' It will be recalled that we have here no evidence that the churches and veterans involved were even so much as accused of the forbidden activities. . . . Where is the 'danger' so far as churches and veterans are concerned? And does the denial of a charitable exemption constitute a reasonable attempt to save this country from revolution? . . ." (Italics in original.)

The majority below also stated that another interest of the State which justified the infringement on free speech was that of [R.F. 51-52] "maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces." This is to be accomplished, the majority informs [*ibid*] "by placing in a favored economic position" those who do not so advocate.

Chief Justice Gibson and Justice Traynor answered this novel constitutional contention [R.F. 63]:

> "The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A state with such power becomes a monitor of thought to determine what is and what is not right thinking.

> Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly. . . ." .

With reference to the oath requirement of Section 32, the majority below simply says [R.F. 54]:

> "Statutory limitations on the free exercise of speech similar in nature to the present limitation have been imposed as valid conditions upon which some privilege, benefit or conditional right has been withheld by a state. . . ."

and cites, in addition to state court rulings including California's, this Court's decisions in *Garner v. Board of Public Works*, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485; *Gerende v. Baltimore, etc., Board of Elections*, 341 U. S. 56, and *United States v. Schwimmer*, 279 U. S. 644.[10]

But none of the cases cited by the majority can justify the restraint of the oath here. Indeed, this Court's decision in *Wieman v. Updegraff*, 344 U. S. 183, in which is explained the meaning of *Garner*, *Adler* and *Gerende* demonstrates their inapplicability.[11] As explained in *Wieman*, the oath sustained in *Gerende* was "that the affiant was not engaged in an attempt to overthrow the government by force or violence" (344 U. S. 183, 189). The oath sus-

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[10]In citing the *Schwimmer* case, the majority below overlooked the fact that that case was expressly overruled by this Court in *Girouard v. United States*, 328 U. S. 61, 69.

[11]The *Adler* case was not an oath case at all. Disqualification for public employment there followed not from refusal to take an oath as to advocacy, but from unexplained *knowing membership* in an organization found by the Board of Regents, after *notice and hearing*, to advocate the overthrow of government by force and violence, and even then the membership was only *prima facie* evidence of disqualification. (*Cf. Konigsberg v. State Bar*, 353 U. S. 252.)

tained in *Garner* applied to a relatively few—city employees. The oath here applies to hundreds of thousands, if not millions (see p. 35, *infra*). In answering the majority's reliance upon *Adler, Gerende* and *Garner* (and also distinguishing *A. C. A. v. Douds,* 339 U. S. 382) Chief Justice Gibson and Justice Traynor correctly held [R.F. 61-62] that the restraint on free speech here was not "in fact reasonably related to the attainment of the governmental object."

Moreover, none of the cases mentioned had to do with disavowal of support. This is a totally new concept in the modern loyalty oath development. If anything, the *Girouard* case (*supra,* note 10), teaches that the requirement of such an oath as a condition to obtaining, there citizenship, here tax exemption, is unavailing.

Furthermore, as so clearly pointed out by Chief Justice Gibson's and Justice Traynor's dissent below [R.F. 57]:

> "A restraint on free speech is not less a restraint when it is imposed indirectly through withholding a privilege rather than directly through taxation, fine, or imprisonment . . . (citing inter alia, *Hannegan v. Esquire, Inc.,* 327 U. S. 146 and Mr. Justice Brandeis' dissent in *United States ex rel Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U. S. 407, 430-431 recalling *Cummings v. Missouri,* 4 Wall (US) 277, 325 to the effect that 'The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name.')
>
> "If it is unconstitutional to restrain plaintiff from advocating overthrow of the government, it is *a fortiori* unconstitutional to require it to prove or declare that it does not advocate overthrow of the government. . . . Such a restraint is the more vicious because it penalizes not only those who advocate overthrow

of the government but also those who do not but will not declare that they do not. There are some who refuse to make the required declaration, not because they advocate overthrow of the government, but because they conscientiously believe that the state has no right to inquire into matters so intimately touching political belief. Rightly or wrongly they fear that such an inquiry is the first step in the censorship of ideas. Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty (citing this Court in *Butler v. Michigan*, 352 U. S. 380)."

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"Section 32 impedes not only advocacy but discussion short of advocacy that may be of the utmost value. . . .

"The majority opinion in the present case goes far beyond any United States Supreme Court decision in upholding legislation that restricts the citizen's right to speak freely. . . . The provisions infringe the right to engage in such advocacy without reference to its seriousness, inhibit free discussion short of advocacy, and penalize the belief that the government has no right to require professions of innocence in the absence of proof of guilt. A law with such consequences cannot stand in the face of the constitutional guarantees."

Additionally, the error of the majority below in construing the provisions to be applicable absent incitement to action, causes the provisions to run afoul the free speech guarantee just as did the statute in *Thornhill v. Alabama*, 310 U. S. 88. For this means that legal (no incitement to action), as well as illegal (incitement to action), advocacy is prohibited. The provisions, therefore, do not "aim

specifically at evils within the allowable area of State control but, on the contrary, sweep . . . within (their) ambit other activity that in ordinary circumstances constitute an exercise of freedom of speech or of the press." (*Thornhill v. Alabama,* 310 U. S. 88, 97.)

We would suppose it to be self-evident, if the investigative power of legislatures is subject to the free speech command of the 1st and 14th Amendments (*Sweezy v. New Hampshire,* 354 U. S. 234; *Watkins v. United States;* 354 U. S. 178), that so also is the taxing power. "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." (Opinion of Chief Justice Stone, dissenting in *Jones v. Opelika,* 316 U. S. 584, 609, expressly adopted in the second case after re-argument, *Jones v. Opelika,* 319 U. S. 103, 104.) In denying tax exemption unless advocacy is forsaken or disavowal of advocacy not declared, California has unconstitutionally taxed "the dissemination of views because they are unpopular, annoying or distasteful" in the same manner as did the ordinance struck down by this Court in *Murdock v. Pennsylvania,* 319 U. S. 105, 116.

C. The Oath Violates the Freedom of Religion Guarantee; It Seriously Breaches the Wall of Separation Between Church and State.

The court below found no reason for concern in that part of the oath and state constitutional provision which required the church to give up its right of moral judgment, on pain of loss of tax exemption, to criticize "the United States" in the event of hostilities. We have previously pointed out (note 10, *supra,* page 16) that the majority below's reliance upon *United States v. Schwimmer,* 279 U. S. 644, is misplaced because of its having

been overruled by this Court in *Girouard v. United States*, 328 U. S. 61, 69.

We need not labor the point that an important role of the Church is to criticize, by advocacy if you will, actions of the Government. In Justice Carter's dissent below, it was pointed out [R.F. 87] that "(t)he heritage of Thomas Jefferson—'Rebellion to Tyrants is obedience to God'—remains with us, embodied in our institutions and traditions." If this be so, we submit, then the requirement that the Church abjure in advance, on pain of loss of tax exemption, its role in this regard is indeed an interference with Freedom of Religion and a breach of the wall of separation between Church and State.

Petitioners recognize, of course, that merely stating the proposition that these cases involve the problem of the separation of Church and State does not furnish the solution. "This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case." (*McCollum v. Board of Education*, 33 U. S. 203, 212, concurring opinion; *cf., Everson v. Board of Education*, 330 U. S. 1; *Zorach v. Clauson*, 343 U. S. 306.) The appeal to the principle here, however, does call for the application of the watchword, ceaseless vigilance, "to prevent (its) erosion by . . . the State." (*Roth v. United States*, 354 U. S. 476, 488.) We think this is a clear case where the wall has been breached. It is a case where religion has not been preserved from censorship and coercion; the coercion by the state has not even been subtly exercised (*McCollum v. Board of Education, supra*, at 217). It is a case involving matters of the spirit, in which "inroads on legitimacy must be resisted at their incipiency" because "this kind of evil grows by what it is

allowed to feed on." (*Sweezy v. New Hampshire*, 354 U. S. 234, 263, concurring opinion.)[12]

The Court below sustained the validity of the oath against the freedom of religion attack on the ground that [R.F. 50] "this oath is 'obviously not a test of religious opinion.'" This the court gathered because [R.F. 49] "the advocacy of the conduct prohibited has been made criminal by Congress."[13] In so doing the majority below has failed to grasp the true meaning of the freedom of religion guarantee.[14] and has failed to note that one of the very reasons for the insertion of the clause in the Constitution was because the Founding Fathers were familiar with the coercion which had been theretofore practiced by the State in requiring acquiescence and the bended knee from the Church.[15]

Mr. Justice Carter's dissent below [R.F. 73-77] answers, we submit, the majority's argument.

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[12]*Cf.* the attempts made in the 1955 and 1957 California Legislature (*e. g.* S. B. 2003, Calif. Leg. 1955) to empower the State Attorney General to investigate church corporations and to remove any officer, trustee or director found by him to be affiliated, a sponsor of, officer, or member of, any organization found by the Attorney General of the United States to be communist or subversive. (See *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94.)

[13]We have pointed out above, p. 14, the court's error in this regard.

[14]It also failed to take cognizance of the second phrase of the oath regarding advocacy of support, etc.

[15]"It (the Flag salute) requires the individual to communicate by word and sign his acceptance of the political ideas it (the Flag) thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." (*West Va. Bd. of Ed. v. Barnette*, 319 U. S. 624, 633) citing William Tell's sentence because he refused to salute a bailiff's hat (21 Encycl. Brittanica, 14th ed., 911, 912) and William Penn's suffering punishment rather than uncover his head in deference to any civil authority (Braithwait, The Beginnings of Quakerism (1912) 200, 228, 230, 232, 233, 447, 451; Fox, Quakers Courageous (1941) 113).

The theory of the majority below seems to be that the provisions here involved cannot impinge on the freedom of religion guarantee because [R.F. 48], "The plaintiff is affected not because it is a religious organization but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption." In its insistence on a "tenet or doctrine or faith," the majority below overlooked the fact (and the demurrer admits same as being the fact) that petitioner's "principles, moral and religious" "as a matter of deepest conscience, belief and conviction" deny "power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs" [R.F. 14, 23]. That this is religious faith of the very kind which led to the separation of church and state is, we should think, unquestioned. That the majority below did not conceive this as being a religious tenet or doctrine is surprising because if the First Amendment means anything at all, it means that Courts cannot sit in judgment on the verity of religious faith. "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state." (*United States v. Ballard*, 322 U. S. 78, 87.)

True, the fact petitioners maintain it is a religious tenet that the State cannot require them to affirm as to their non-advocacy, does not dispose of the question (*Reynolds v. United States*, 98 U. S. 145; *Cleveland v. United States*,

392 U. S. 14; *Prince v. Massachusetts,* 321 U. S. 158). But that it is a religious tenet cannot be gainsaid. These cases, as well as *Kedroff v. St. Nicholas Cathedral,* 344 U. S. 94, teach that it is only acts, not doctrine, that can be punished by the state.

We turn then to the majority's argument [R.F. 48] that petitioners are affected not because they are religious organizations but because they are taxpayers. Implicit in the majority's reasoning is the same error into which this Court first fell in *Minersville School District v. Gobitis,* 310 U. S. 586, wherein, regardless of religious belief, school children were required to bend to political orthodoxy by saluting the Flag, on pain of expulsion from school. Overruling *Gobitis,* this Court said in *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 642):

> "If there is one fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.* . . ." (Italics added.)

But it is precisely this which the oath here requires.[16]

Justice Carter in his dissent below [R.F. 73-77] has shown how the use of the *oath ex-officio* though often

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[16]We do not dwell on the "depressing" fact "that the oath has always cropped up as a political device when the political order was crumbling. (Justice Carter, dissenting below [R.F. 69], quoting from Professor Carl Joachim Friedrich's article, "Teacher's Oaths," 172 Harpers 171, Jan. 1936.) Nor are we unmindful that oaths "are the first weapons young oppression learns to handle; weapons the more odious since, though barbed and poisoned, neither strength nor courage is necessary to wield them." (Sen James A. Bayard of Delaware, in an address to the Senate, January 16, 1864 (34 Cong. Globe, Part 1, 342).)

couched in religious terms was really a political weapon,[17] and how the freedom effected from religious repression contributed to and went hand in hand with the freedom effected from political repression. The oath in question here designed, in the view of the majority below [R.F. 51] to maintain the loyalty of the people, though couched in political terms, is religious in its effect on the church, for it forces the church to acknowledge that the state has the power to compel the church to confess its advocacy.[18]

As noted, the majority below said [R.F. 49, 50] that because the advocacy condemned by the oath has been made illegal by the Smith Act, petitioner cannot complain of the contents of the oath since it is "obviously not a test of religious opinion." The fact, aside, that the majority

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[17]In his address in the House of Commons on the repeal of the Test and Corporations Acts, Feb. 26, 1828, Mr. Ferguson said: "(The Test Act) was leveled against the Catholics, not as a religious, but a political sect, at the head of which was the Duke of York and even the King himself." (18 Hansard, Parliamentary Debates, 2nd Series (1828) 718.)

To James I, the Puritan movement represented the hated doctrine of the separation of church and state. "The official view then prevalent [was] that church and state were one society in a twofold aspect and to assail the former inevitably involved the latter. . . . (Davies, The Early Stuarts, in 9 Oxford History of England (1937) 66.) "(T)he real difficulties with the Puritans stemmed from the fact that they were '. . . . ever discontented with the present government and impatient to suffer any superiority, ...'" (Schaar, *Loyalty in America*, Univ. of Calif. Press, 1957, page 65, quoting from Perry, *Puritanism and Democracy*, Vanguard Press, 1944, page 69.)

[18]In suggesting that the oath affects petitioners here not because they are churches but because they may be taxpayers, the majority below overlooked the fact that a statute may be valid under one set of facts and invalid under another (*Kansas City Southern R. Co. v. Anderson*, 233 U. S. 325, 329-330) and that it may be valid as to one class of persons and invalid as to others (*N. Y. ex rel Hatch v. Reardon*, 204 U. S. 152, 160-161). It is as churches that petitioners are affected here, a fact which cannot be overlooked and in the light of which the oath must be judged.

erroneously interpreted the Smith Act,[19] and the additional fact, also aside, that the majority overlooked the second phrase of the oath having to do with support of a foreign government, etc.,[20] the majority's reasoning misses the mark. The oath which the State here seeks to coerce the Church into taking has to do with what the Church advocates, or rather, what the Church does not advocate. While the majority describes [R.F. 47] this advocacy as action, no matter how named, it is advocacy nevertheless. And that is the pith of the question. If the principle of the wall of separation of Church from State means anything at all, it must mean that the State has no power to coerce the Church into *stating* that which it does not advocate, any more than it can compel the Church to *state* that which it does advocate. This is the point. (*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642; *Everson v. Board of Education*, 330 U. S. 1, 15.)

The use of the oath to compel political conformity and its effect on the Founding Fathers in relation to the adoption of the First Amendment is well known to this Court.[21] Justice Carter, in his dissent below also tells the story [R.F. 73-77]. We mention here a few examples of oaths, some strikingly similar to that here, all of which played their role in what eventually emerged as the principle of the separation of Church and State.

Sir Thomas More refused to take an oath recognizing that Henry VIII's marriage to Catherine had been invalid *ab initio*. For his reluctance he was convicted and exe-

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[19]As demonstrated by *Yates v. United States*, 354 U. S. 298.

[20]As to which the Smith Act has nothing to do.

[21]*Cf.*, *American Communications Association v. Douds*, 339 U. S. 382, 447 (dissent); *Everson v. Board of Education*, 330 U. S. 1, 9.

cuted for treason on the theory that he had thus denied the King's title as supreme head of the Church.[22]

In 1606, during the reign of James I, an act was passed[23] requiring a long oath avowing, *inter alia,* that James was the lawful king, declaring that the Pope could not depose him or authorize an invasion of his countries or discharge his subjects of the allegiance to him or permit them to bear arms or raise tumults or *commit violence against him,* swearing allegiance to the king, renouncing the proposition that an excommunicated ruler might be deposed or assassinated by his subjects. At first the oath could be administered to those over eighteen who had been indicted or convicted of recusancy, the failure to attend the Church of England, but by 1610 the oath was required of persons holding a wide variety of government positions.[24]

The Corporation Act of 1661[25] required all those holding or seeking office to declare under oath their belief in the *unlawfulness of taking arms against the king* as well as disclaiming any obligation under the Solemn League and Covenant (the Puritan's declaration against taking the sacrament according to the Anglican Church). In 1662, by the Act of Uniformity[26] each minister was required to

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[22]Fisher, History of England From the Accession of Henry VII to the Death of Henry VIII (1910), in 5 Political History of England 353. More is said to have written his daughter: "It was a very hard thing to compel me to say either precisely with it against my conscience to the loss of my soul, or precisely against it to the destruction of my body." (Smith, A History of England (1949) 222; Maguire, Attack of the Common Lawyers on the Oath *Ex Officio* as administered in the Ecclesiastical Courts in England, in Essays in History and Political Theory in Honor of C. H. McIllwain (1936), 211.)

[23]3 Jac. I. C. 4.

[24]7 Jac. I, c. 6.

[25]13 Car. II, stat. 2, c. 1.

[26]14 Car. II, c. 4.

take the Corporation Act oaths. In 1665, by the Five Mile Act,[27] each minister so deposed (for refusal to take the oath) was required to state under oath that under any pretense it was unlawful *to take arms against the king* and to pledge that they would not attempt *any alteration in the government of church or state.* Refusal meant inability to come within five miles of a community in which they had previously preached.

The English, of course, were not alone in their call for oaths as a test of loyalty to the State.

> "Polycarp of Smyrna was asked only 'to swear by the Good Fortune of Caesar.' Speratus Donata and the other Scillitan martyrs likewise were asked merely to swear by the genius of their lord, the emperor, and to pray for his safety." (32 Cal. L. Rev. 1, 2, Comment.)

When they would not, they were persecuted not because of their religion but because of their lack, so-called, of loyalty.

Suspected Christians were asked to offer incense to the Gods or the statues of deified emperors, not to compel religious thinking or worship, but

> "to symbolize the unity and solidarity of an Empire which embraced so many people of different beliefs and different gods; its intention was political, to promote union and loyalty; . . ." (Bury, A History of Free Thought, pp. 43-44.)

Enough has been shown, we think, to demonstrate that, in the light of history and tradition, the requirement of the oath here does indeed impinge upon freedom of re-

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[27] 17 Car. II, c. 2.

ligion and the separation of Church and State.[28] For if the state can exact today, as the price of tax exemption, an oath as to disavowal of advocacy, on the theory that thus is loyalty shown, tomorrow it can redefine the meaning of loyalty and demand that the Church affirm as to its curriculum and the contents of the sermon. If the instant oath be proper and if the State should deem a more detailed and stringent oath necessary, at what point will the Church be able to maintain that the wall of separation has been breached? It is not the content of the oath alone, but the coercion of Church by State, which truly penetrates the wall and establishes the Church as subject to the will of the State.

Historically, concepts of loyalty shift and change as the forces pulling and tugging within the State lose or gain strength.[29] The oath of loyalty imposed today by a free society might be thought by many to be unobjectionable. But what of tomorrow and the day after? Can the Church be forced to surrender its moral convictions to a State whose principles fluctuate with the social and economic winds? We think not. The State's inroad must, therefore, "be resisted at (its) incipiency."

The court below erred further in failing to understand that even the content of the oath shatters the wall. Especially is this true of the second phrase which calls for disavowal of advocacy of support of a foreign government in the event of hostilities. In other words the church must now, on penalty of loss of tax exemption, foreswear its

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[28]As Appendix B. hereto, we set out a more extensive analysis made by William B. Murrish, Esq. of the California Bar, showing the compelling parallel between the historic religious test oaths of 16th-18th Century England and the oath involved here today.

[29]Schaar, *Loyalty in America*, Univ. of Calif. Press, 1957, Chaps. 3, 4 and 5.

right of moral judgment in the indefinite future regardless of the issues involved.

It would be to disregard a wealth of history to sustain such a proposition. This Court has not done so. The story is dramatically told in the *Schwimmer, Macintosh, Bland, Girouard* and *Cohnstaedt* series of cases.[30]

The *Girouard* case, it will be remembered, overruled *Schwimmer, Macintosh* and *Bland* which had required, as the price of naturalization, that an alien foreswear his conscientious scruples concerning war. The *Macintosh* case, perhaps, best illustrates the point because Professor Macintosh did not claim to be a pacifist. In answer to the question on the preliminary naturalization form, "If necessary, are you willing to take up arms in defense of this country?" he answered: "Yes, but I should want to be free to judge of the necessity" (283 U. S. at 617). By way of written statement Professor Macintosh said (283 U. S. at 618):

> "I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise before hand, and without knowing the cause for which my country may go to war, either that I will or that I will not take up arms in defense of this country, however 'necessary' the war may seem to be to the government of the day."

By way of oral testimony at the trial, as described by the court, he said (283 U. S. at 618, 619):

> "he would have to believe that the war was morally justified before he would take up arms in it or give

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[30] *United States v. Schwimmer*, 279 U. S. 644; *United States v. Macintosh*, 283 U. S. 605; *United States v. Bland*, 283 U. S. 636; *Girouard v. United States*, 328 U. S. 61; *Cohnstaedt v. United States*, 339 U. S. 901.

it his moral support. He was ready to give the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God. He did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered justified; but he preferred not to make any absolute promise at the time of the hearing, because of his ignorance of all the circumstances which might affect his judgment with reference to such a war. . . . The position thus taken was the only one he could take consistently with his moral principles and with what he understood to be the moral principles of Christianity."

Macintosh was denied citizenship.

Mr. Chief Justice Hughes, in his historic dissent, later accepted by this court in *Girouard*, said (283 U. S. at 633), that while, undoubtedly, the State had the power to enforce obedience to laws regardless of scruples, nevertheless "in the forum of conscience, duty to a moral power higher than the state has always been maintained"; that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation"; that there is abundant room for maintaining the supremacy of law as essential to orderly government "without demanding that . . . citizens . . . shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power."

In the *Girouard* case, this Court said (328 U. S. at 68):

". . . The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual.

> The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. . . ."

These cases involved admission to citizenship, a governmental interest, at least as weighty, we suggest, as the right to demand taxes. These cases involved aliens, a field in which, save for procedural due process, Congress' authority has been thought to be virtually unlimited (*cf., Galvan v. Press,* 347 U. S. 522). Nevertheless this Court held that man's duty to God, his conscience in the making of moral judgments and in not promising beforehand to give up that right, need not knuckle under to the State.

The oath, as interpreted by the Government in the *Schwimmer* and following cases, was interpreted by this Court as a test oath. No less is the oath at bar. And this Court said in *Girouard* (328 U. S. at 69): "The test oath is abhorrent to our tradition." By its insistence on the oath here, the State, through the decision below, has demanded of the Church that which it may not, consistent with our traditions and the First Amendment. The insistence by respondents on the oath

> "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (*West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 642.)

D. The Provisions Violate Due Process Because They Are Arbitrary.

The provisions in question violate Due Process because they are arbitrary abridgments of freedom of expression unwarranted by the evil they seek to correct. There is no showing, and indeed, no contention that churches have engaged, or that there is *any* danger that they might engage, either within or without constitutional limits, in advocacy of doctrine proscribed by the provisions. Indeed the Court below concedes the contrary to be true.[31] And neither the legislature nor the people have made findings of any such danger,[32] nor have counsel for respondents ever advanced the suggestion.[33] Moreover, twice since

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[31]Thus the majority below said [R.F. 56]: "It is inconceivable that an organization actuated by the doctrinal pronouncements there declared (principles and objectives of that petitioner attached to its Protest) would knowingly harbor within itself any person or group of persons who would engage in the subversive activities referred to in section 19 of Article XX. It is taken for granted that an organization actuated by those high purposes and ideals would be the first to champion the efforts of the state to protect itself against the destruction of those guarantees which are necessary to the existence of the plaintiff and to the preservation of the fundamental rights which it otherwise enjoys."

[32]*Cf.* Findings by the California legislature that there was a danger of subversion from teachers (Ed. Code, Sec. 12600) and from public employees (Gov. Code, Sec. 1027.5). These were passed by the same legislature that passed Section 32. They find that there is a clear and present danger that members of the world communism movement will infiltrate the teaching and government employment professions and indoctrinate students and impede the enforcement of law. No such findings were made as to churches nor any other of the tax exempted bodies.

[33]In the official argument submitted to the voters of California in 1952 when the constitutional provision was voted on, no suggestion was made that there was any danger from churches viz-a-viz the noted advocacy. Instead the whole argument was slanded at the punitive: "this will have the effect of hitting such persons or organizations in the pocketbook." See note 5, *supra*, p. 11, describing the pamphlet, lodged with this Court, containing the Arguments to Voters.

Section 32 was passed has the California legislature excused churches which failed to get their exemptions because they did not sign the oath.[34] True, the legislature still required the bended-knee in the form of the oath, but so anxious was the legislature that the churches immediately get their exemption that both times it made the legislation emergency measures rather than have them await the normal 90 days after adjournment.[35] It is to be noted that when Section 32 was added to the Revenue and Taxation Code (1953 Cal. Stats., ch. 1503, p. 3114), no urgency clause was attached. A further incongruity is present when it is noticed that under the ameliorating statute (Rev. & Tax. Code, Sec. 262) even though a church did wrongfully advocate in the past, it gets tax exemption even for that past if today it takes the oath. Justification for Article XX and Section 32 cannot, therefore, be claimed on the ground of danger.[35a]

While, perhaps, more clearly evident when stated in terms of denial of equal protection[36] (treated in the next section), the provisions, especially the oath, nevertheless

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[34]Calif. Stats. 1955, c. 6, p. 441; Calif. Stats. 1957, c. 4, p. 550. (Cal. Rev. and Tax. Code, Sec. 262.)

[35]We set out in Appendix C, the 1957 excusing legislation and a portion of the State Constitutional provision regarding urgency measures. The legislation declares that the failure of churches to obtain their tax exemption because they failed to sign the oath "substantially impair(s) their ability to function effectively."

[35a]Indeed the lack of danger to justify any of the program is seen from the fact that in addition to cancelling past church taxes, providing the oath was currently taken, the 1957 legislature did the same thing as to the hospital, orphanage, college and welfare exemptions. (Cal. Rev. & Tax. Code, Secs. 263, 264, 266, 268; Cal. Stats. 1957, c. 7, p. 553, c. 417, p. 1266; c. 2108, p. 3737, c. 2015, p. 3584) and even for ordinary corporate exemptions. (Cal. Rev. & Tax. Code, Secs. 26072.5; Cal. Stats. 1956, c. 11, p. 138, as amended stats. 1957, c. 21, 574.)

[36]*Cf. Bolling v. Sharpe*, 347 U. S. 497, 499: "(T)he concepts of equal protection and due process . . . are not mutually exclusive'."

also violate due process in the substantive sense because the requirements of abandonment of advocacy and the declaration of non-advocacy are not reasonably related to the purpose for which church tax exemption is given.

"The test of validity in respect of due process of law is whether the means adopted is appropriate to the end." (*Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 90.) So viewed, it would seem clear that Article XX requiring relinquishment of advocacy or the oath requiring abjuration of advocacy have no relationship to the power of the state to raise revenue.[37] There is no basis for the non-exemption from taxes by a church which uses its property exclusively for religious worship (the *sin qua non* of the church exemption) because it will not take an oath as to non-advocacy and at the same time to give exemption to other worshippers simply because they take an oath.

Taxing statutes, state or federal, like any others, which are arbitrary must fall before the due process clause.[38] There is no more justification for the oath required in the case at bar than there was for the oath required by the "Gwinn Amendment" (66 Stat. 403; 67 Stat. 307; 42 U. S. C. 1411c) that occupants of low-cost public housing were not members of subversive organizations. The oath at bar, like the Gwinn Amendment oath, is arbitrary and offends due process.[39]

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[37]To say nothing of the lack of power in the State to regulate advocacy by a church or right thinking.

[38]*Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71; *Schlesinger v. Wisconsin*, 270 U. S. 230; *Heiner v. Donnan*, 285 U. S. 312; *Hoeper v. Tax Commission*, 284 U. S. 26.

[39]*Lawson v. Housing Authority of Milwaukee*, 70 N. W. 2d 605, 270 Wisc. 269, cert. den. 350 U. S. 882; *Rudder v. United States*, 226 F. 2d 51 (C. A. D. C., 1955); *Kutcher v. Housing Authority of City of Newark*, 119 A. 2d 1, 20 N. J. 181; *Chicago Housing Authority v. Blackman*, 122 N. E. 2d 522, 4 Ill. 2d 319.

In sustaining the affidavit in *American Communications Association v. Douds*, 339 U. S. 382, this Court balanced the damage to the national economy from interstate political strikes against the restriction on the few affected by the affidavit requirement, and found the former to be of such weight as to justify the latter. The Court said (339 U. S. at 404):

> ". . . (I)t (the Taft-Hartley affidavit) leaves *those few* who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress *has concluded are being abused to the injury of the public* by members of the described groups." (Italics added.)

No such few members, nor abuse, nor injury can be cited to justify the restraint here. Not just a few, but millions of persons in California—every householder, every farmer, every payer of income taxes, every church, every veteran, every charity—are affected.

California's Revenue and Taxation Code, its Agriculture Code, its Government Code and its Constitution list at least 25 (probably more) types of property which are exempt from taxation. One of them (Const., Art. 13, Sec. 10½) provides for an exemption for *every householder in the state*. The Statistical Abstract of the United States for 1956, page 49, lists California as having *3,336,391* households in 1950. The Abstract shows (p. 371) that in 1952, 4,598,000 income tax returns were filed by Californians. (Cal. Rev. & Tax. Code, Sec. 17181, provides a personal income tax exemption for every taxpayer and dependent in the State.) The Abstract further shows (p. 628) that in 1954 there were 123,000 farms in the state. (Art. 13, Sec. 1 of the Cal. Const. exempts from taxation all growing crops in the State.) The Annual Report of the Los Angeles County Tax Assessor for 1955-

1956, lists (p. 8) as the number of veterans who filed claims for exemption in the *county* in 1956, as *501,000*. In other words, the provisions are all pervasive and rest their pall on *every individual in the state*.

And all this without even a suggestion of danger or harm. "Surely this is to burn the house to roast the pig" (*Butler v. Michigan*, 352 U. S. 380, 383). As Justice Carter said below [R.F. 88], "The issue is momentous, of far reaching implication, and the ruling of the court will be a categorical imperative whose cumulative effect will be seen only in the fullness of time." This Court should cut that time short.

The State's intrusion of its political power into this activity cannot be said to be "for reasons that are exigent and obviously compelling." (Mr. Justice Frankfurter, concurring, in *Sweezy v. New Hampshire*, 354 U. S. at 262.)

And due process has been offended on even another score. As seen, the Court below construed the advocacy of the overthrow of the government by force and violence phrase as not requiring incitement to action. Accordingly, Article XX and Section 32 apply to both lawful (absence of incitement to action), as well as to unlawful (incitement to action), advocacy. Surely this is "indiscriminate classification of innocent with knowing activity." (*Wieman v. Updegraff*, 344 U. S. 183, 191.) Like the oath in that case, the provisions "must fall as an assertion of arbitrary power" (*ibid.*). Like the oath in *Wieman*, the provisions here offend due process.

Additionally, the oath required by Section 32 violates due process because it creates a conclusive presumption that everyone who refuses to sign the oath advocates the overthrow of the government by force and violence or other unlawful means or advocates the support of a for-

eign government against the United States in the event of hostilities, or both. This is so because the only ground for denial of tax exemption is the proscribed advocacy. Yet any other reason for not signing is, under the statute, immaterial. Even if the claimant were given an opportunity to be heard—which he is not—and proved that he did not so advocate, the statute prevents the exemption because the declaration has not been signed.

Even a rebuttable presumption, to be constitutionally sustained, must have a rational connection between the fact proved and the ultimate fact presumed. If the inference of one from the proof of the other is not predicated upon human experience, the presumption is arbitrary. (*United States v. Tot*, 319 U. S. 463; *Morrison v. California*, 291 U. S. 82.) So much more, therefore, must a conclusive presumption be so grounded. It is well within the bounds of ordinary human experience that many persons and organizations (petitioners here are examples) have personal, moral or religious convictions against signing confessions of advocacy or beliefs. Such persons are not the slightest bit interested in overthrowing the government, or in supporting foreign governments, or in advocating either of these subjects.

It, therefore, just cannot be concluded, as a matter of common human experience, that all persons who refuse to sign the oath that they do not advocate, do so because they do advocate. Section 32, accordingly, is as arbitrary, and therefore as unconstitutional as was the charter provision struck down in *Slochower v. Board of Higher Education*, 350 U. S. 551, for here, as there, "The questions asked [the oath required] are taken as confessed and made the basis of discharge [denial of tax exemption]." (Paraphrased from *Slochower* at p. 558.)

E. The Provisions Violate the Equal Protection Clause.

In his dissent, Justice Carter said [R.F. 79] that when the evil to be avoided is considered, there is here no reasonable classification; that there is no evidence that any church has advocated, or intended to advocate, the forbidden philosophy. He described the provisions as a shotgun attempt to hit an undefined object. Commenting on the majority's thesis that the reason for the oath is to protect state revenues from impairment by those who would destroy it by unlawful means, he correctly points out that the majority does not make clear why it is that charitable institutions are singled out as presenting the greatest danger to this country in peace and war. He suggests that, on the contrary, churches would seem to be the least likely subjects of classification for legislative measures to correct the evil thought to exist.

And then, after quoting from this Court's decision in *Louisville Gas & E. Co. v. Coleman, 277* U. S. 32, 37, to the effect that "mere difference is not enough," the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis," Justice Carter said [R.F. 82]:

> "There is in my mind no doubt whatsoever that the legislation with which we are here concerned bears no relation whatsoever to the objective to be achieved. . . . The tax itself is on property owned by churches and used for religious purposes and the exemption applies only when such property is used for such purposes. . . . Property taxes and unpopular beliefs or advocacy would appear to be as far apart as the poles and to bear no reasonable relationship one to the other. The classification here involved falls directly

within the rule of the Louisville Gas case: it is arbitrary, it does not rest upon a difference bearing a reasonable and just relation to the act in respect to which the classification is proposed; it is a *mere* difference which 'is not enough.'"

It cannot be maintained that Article XX is an exemption provision. Quite the contrary: it is a taxing provision, for it levies a tax on property not previously subject to tax; by its terms it has no application to property which was taxable. Accordingly, it is a tax (albeit, also a penalty) and, as a tax is, as the *Louisville* case holds, subject to the limitations of the equal protection clause.[40]

In discussing this question it becomes necessary to ascertain what it is that is being taxed. In the cases at bar it is real property—real property that is used solely and exclusively for religious worship. The vice, then, of Article

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[40]*Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1929) (holding unconstitutional a state statute imposing a gross receipts tax upon corporations engaged in the taxi business and excluding from tax natural persons engaged in the same business); *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535 (1934) (state statute imposing tax on net receipts of foreign fire insurance corporations could not constitutionally be applied to receipts of such corporations from casualty insurance because no similar tax was levied on the receipts of foreign casualty insurance corporations); *Southern Railway Co. v. Greene*, 216 U. S. 400 (1909) (statute imposing higher franchise tax on railroads owned by foreign corporations than on railroads owned by domestic corporations held unconstitutional); *Smith v. Cahoon*, 283 U. S. 553 (1930) (state statute requiring carriers transporting goods for hire to furnish bond or insurance policy, but excepting carriers transporting agricultural, horticultural, dairy, or fish from its operation held unconstitutional); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71 (1924) (holding statute measuring franchise tax by ratio based upon shares of authorized common stock and the value of property owned and used within the state held unconstitutional because the measure of the tax had no reasonable relation to the value of the franchise); *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494 (it is violative of the equal protection clause to tax foreign corporation on net receipts but not to so tax domestic corporations).

XX, as well as Section 32 becomes quickly apparent, for the discrimination[41] that is effected by them depends not upon the nature of the property, its value, extent, location use nor any other factor relating to the property, but rather upon unrelated, non-advocacy of the owners. Under Article XX, the same, identical property put to the same, identical use is taxable or non-taxable depending upon whether its owner advocates; while under Section 32, the same, identical property put to the same identical use becomes taxable or non-taxable depending not even on whether the owner advocates but on whether the owner will say that it does not advocate.

There need thus be no difference between property taxed and property not taxed. The lack of reasonable connection for the tax and the unreasonableness thereof becomes the more apparent when it is realized that in California payment of a tax such as this—which is on the property and not on the owner—can only be enforced by sale of the property, not against the owner (*McPike v. Heaton,* 131 Cal. 109, 63 Pac. 179).

Moreover, the lack of reasonable classification is further demonstrated when it is considered that in truth the oath could not under any circumstances achieve its claimed objectives. Though it purports to cover all churches (and other charitable organizations), in reality it is imposed only on churches whose conscience is not offended and on churches whose poverty compels them to sacrifice conscience rather than close their doors. Thus the determining factor may well be the wealth of the particular church.

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[41]"Discrimination of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the Constitutional provision." (*Louisville Gas & E. Co. v. Coleman,* 277 U. S. 32, 37.)

In effect, the State has put the privilege of being "subversive" on sale.

The classification, accordingly, is not reasonable, it is arbitrary and does not rest upon any ground of difference having a fair and substantial relation to the object of the legislation. Both Article XX and Section 32 deny equal protection.

II.

The Provisions Violate the Supremacy Clause.

It is to be noted that the advocacy, and the oath as to advocacy, condemned by the second portion of the provisions here in question[42] have nothing to do with the State of California. The provisions are an out-and-out bald attempt by the State of California to control the utterances of Californians in the field not merely of national problems, but actually in the field of international relations, and particularly in time of war which, of all matters, is peculiarly of federal concern.

Even aside from the statutory scheme in the field of sedition to which this Court made reference in *Pennsylvania v. Nelson*, 350 U. S. 497, we believe that a state's effort to impose penalties and restrictions upon what citizens might or might not say on the subject of the *nation's* relations to a *foreign* government can scarcely avoid running afoul the Supremacy Clause.[43] Compare *United*

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[42]"advocate(s) the support of a foreign government against the United States in (the) event of hostilities".

[43]We do not here go into a discussion of the legislation which Congress has enacted in the field, save to note that it is not without significance that in none of this legislation (see, *e.g.* 22 U. S. C. 611-621 (Chap. 115 entitled, Treason, Sedition and Subversive Activities)) has Congress seen fit to proscribe peacetime advocacy of support of a foreign government against the United States in the

States v. Belmont, 301 U. S. 324; *United States v. Pink*, 315 U. S. 203; *Hines v. Davidowitz*, 312 U. S. 352.

In *Pennsylvania v. Nelson, supra*, this Court found the state statute bad for three reasons: (1) because the congressional plan in the field of sedition made it reasonable to determine that no room has been left for state supplementation, (2) because the federal statute touches a field in which the federal interest is so dominant as to preclude state enforcement on the same subject, and (3) because enforcement of state acts present a serious danger of conflict in the administration of the federal program.[44]

We submit that the provisions at bar are subject to all three of the defects found in *Nelson*.

The facile answer given by the majority below[45] does not, we submit, suffice. It is axiomatic that a state cannot do indirectly what it cannot do directly (*Barrows v. Jackson*, 346 U. S. 249, 254). If the state cannot punish the

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event of hostilities. The advocacy prohibited (*e.g.* 18 U. S. C. 2385) is as to overthrow of this government, not support of another—two quite different things as even the provisions questioned in these cases show on their face. The "support of a foreign government" phase of the provisions here involved bears a melancholy resemblance to the Sedition Act of 1798 (1 Stat. 596: "aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government.") That repealed legislation may well have been the model for the current California provision.

[44]Thus the holding of the court below, that the advocacy condemned here is illegal despite the absence of incitement to action, is directly contrary to this Court's ruling as to the Smith Act in *Yates v. United States*, 354 U. S. 298.

[45][R.F. 55-56]: "Furthermore, in any consideration of the possible application of the Nelson case to the case at bar, it would be unreasonable to conclude that the federal government intends to or has occupied the field of state taxation."

disapproved advocacy by the exercise of the criminal power, it cannot punish such advocacy by the exercise of the taxing power (*cf., McCulloch v. Maryland,* 4 Wheat (U. S.) 316, 431, 4 L. Ed. 579, 607).

Conclusion.

The decisions below should be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions and Statutes Which the Case Involves.

California Revenue and Taxation Code, Section 32 (Calif. Stats. 1953, c. 1503, p. 3114; §1):

> "Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution."

California Constitution, Article XX, Section 19(b) [added November 4, 1952]:

> "Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other

unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

"(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

"The Legislature shall enact such laws as may be necessary to enforce the provisions of this section."

First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the 14th Amendment to the United States Constitution:

". . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, Clause 2 of the United States Constitution:

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

California Constitution, Article XIII, Section 1½:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said building, when the same are used solely and exclusively for religious worship, or, in the case of a building in the course of erection, the same is intended to be used solely and exclusively for religious worship, shall be free from taxation; provided, that no building so used, or if in the course of erection, intended to be so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation."[1]

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[1]Subsequent to the assessments here involved, this section was twice amended in manners not material to these cases. Basically the section is the same today, some additional exemption having been given. The section as above quoted is how it read at the time of the assessments and the denial of the exemptions involved in these cases.

APPENDIX B.

The Parallel Between the Religious Test Oaths of 16th to 18th Century England and the Oath Required by Section 32 of the California Revenue and Taxation Code.*

The true nature and significance of the English history is not well appreciated in our day. Indeed the material is cumbersome in the extreme to unearth, correlate and develop to meaningful focus; there are hundreds of such Test Oath statutes, running from Volume IV of Statutes at Large through at least the following twenty succeeding volumes, and covering the reigns of Henry VIII, beginning in 1509, through at least George II, ending in 1760; and frequently a statute will incorporate either the oath or the penalties, or both, of one or more preceding oath statutes. But the import of the material is most valuable in disclosing the parallel between the religious test oaths of those days and the oath required by Section 32 of the California Revenue and Taxation Code.

1. The Feature of "Advocacy of Force and Violence."

The California Oath applied to churches requires an oath that the church,

> ". . . does not advocate the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means or advocate the support of a foreign government against the United States in event of hostilities."

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*An analysis prepared by William B. Murrish, Esq. of the California Bar.

Few even on the side of the government will quarrel that the First Amendment has barred test oaths. But government either assumes, or openly asserts, that the oath at bar, being essentially an oath directed at compelling disavowal of advocacy of force and violence, is not, even where applied to churches, a religious Test Oath, and is not of the character of the historic oaths of England's experience.

Yet this is basic—very basic—error. Lying at the very *core* of the classic English Test Oaths was this very feature and rationale—coerced disavowal, in a religious context, of *advocacy of or belief in force and violence against government*. Thus one of the classic Test Oaths was the "Jacobean Oath" of James I, imposed by 3 Jac. I, c. 4, 7 Stats, at Large 150, 155-6. In central part it consisted of disavowal on oath of any right or authority in the Pope or the Catholic Church to oppose the civil authority of the King, or to "give license or leave to bear arms, raise tumults, or to offer any violence or hurt to his Majesty's Royal Person, State, or Government." This oath is discussed in a significant review, "The Jacobean Oath of Allegiance and English Lay Catholics" in 28 Catholic Historical Review, 159-183, wherein unyielding Catholic refusal on principle to execute the oath—though the penalty, in ultimate, was death or praemunire—is treated. Catholics were at first divided as to consistency with religious conscience of taking the oath, but the division was resolved by a formal opinion of the Pope declaring Catholics could not lawfully take the oath because it contained "many things contrary to faith and salvation." (28 Cath. Hist. Rev. at p. 169.)

Disavowal of force and violence was also at the heart of the oath required under the famous Five Mile Act,

17 Car. II, c. 2, 8 Stats. at large, 217, 218. That Statute, which, forbade ministers violating its provisions from approaching nearer than five miles to any organized town, required an oath from all "parsons, vicars, curates, lecturers, and other person in holy orders, or pretended holy orders, and all stipendiaries and other persons who have been possessed of any eclesiastical [sic] or spiritual promotion, and every of them," reading as below:

> "I, A. B., do swear, That it is not lawful upon any pretense whatsoever to take arms against the King: and that I do abhor that traitorous position of taking arms by his authority against his person, or against those that are commissioned by him in pursuance of such commission; and that I will not at any time endeavor any alteration of government, either in church or state."

An identical oath was required under the famous Corporation Act of 1661, appearing in 13 Car. II, Stat. 2, c. 1, 8 Stats. at Large 23, and by the Act of Uniformity of 1662, appearing in 14 Car. II, c. 4. The oath required by the Test Act of 1672, appearing in 25 Car. II, c. 2, was identical in content to the Jacobean Oath heretofore quoted in full.

It is very plain from such material as the foregoing —which could be many times multiplied—that the feature of coercing civil loyalty affirmations contrary to religious conscience, accompanied by compulsory disavowals of belief in or advocacy of force and violence against civil government, was a feature basic and native to the English Test Oaths, and was not a feature which might distinguish the instant oath from those historic subjects.

May's "Constitutional History of England," Volume II, at pages 173-174, comments aptly on the subject here as follows:

> "By another act, no one could serve as a vestryman, unless he made a declaration against taking up arms and the covenant, and engaged to conform to the liturgy. . . . This, again, was succeeded by a new test, by which the clergy were required to swear that it was not lawful, on any pretense whatever, to take up arms against the King. This test, conceived in the spirit of the High Church, touched the consciences of . . . the Calvinistic clergy, many of whom refused to take it, and further swelled the ranks of dissent. While the foundations of the Church were narrowed by such laws as these, nonconformists were pursued by incessant persecutions. Eight thousand Protestants are said to have been imprisoned, besides great numbers of Catholics. Fifteen hundred Quakers were confined: of whom three hundred and fifty died in prison."

A second feature identifying the instant oath totally with historic English Test Oaths, and a feature paralleling the foregoing feature of denial of force and violence closely and being inter-related therewith very considerably, is the portion of the instant oath compelling and coercing denial of advocacy of support of a foreign power in event of inter-nation war. A feature present in each and every of the English oaths discussed above re force and violence, and a feature present as well in hundreds of others of the English Test Oaths, was a requirement that the oath-taker disavow and renounce advocacy of or belief in any right or authority in any religious agency or institution—including particularly, and usually by name, the Pope and the Holy See—to aid,

abet, instigate or give support to any foreign power in event of war or hostilities, and a requirement that the juror deny any belief or allegiance whatever to the contrary.

Thus the famous Jacobean Oath above described required an averral on this score that:

> "I, A. B., do truly and sincerely acknowledge, profess, testify and declare on my conscience, before God and the world, that . . . the Pope, neither of himself, nor by any authority of the Church or See of Rome, or by any other means with any other, hath any power or authority . . . to dispose of any of His Majesty's Kingdoms or Dominions, or to authorize any Foreign Prince to invade or annoy him or his countries, or to discharge any of his subjects of their allegiance and obedience to His Majesty . . . etc. . . ."
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> —3 Jac. I, c. 4, 7 Stats. at Large, 150, 155.

Indeed, this feature was *central* to and dominant in a strong majority of all of the English oaths, and the above example could be multiplied from the statutes in Volumes 4 through 24 of Statutes at Large almost without end. The identity between the instant oath and the English classic test oaths in this respect is *very* complete and total. Indeed, many of the English oaths contain no content whatever beyond renunciation of the beliefs here treated, (i.e. belief that the Pope or any other religious agency might hold authority or right to influence or interfere in any respect with the exclusive support due, and the complete allegiance owed, by a subject to the King in the event of hostilities).

2. The Feature of Tax Disability as Connected to a Test Oath.

It has been urged that in any event the California oath is not parallel to the English Test Oaths because the California oath is not a condition laid upon the holding of civil office or emolument, but is solely a tax oath laid only upon the subject of a tax exemption, and having only a *tax* consequence. It is suggested this distinguishes it in full. Such is not the case. Because Test Oaths are mentioned as such in the Federal Constitution only in a clause (Art. VI, cl. 3) prohibiting their use as a condition of Federal civil employment, it is sometimes mistakenly suggested or conceived that religious test oaths refer only to oaths conditioning civil office or emolument. History is unanswerably to the contrary. Historically the English Test Oaths, though indeed often laid as conditions on civil offices, and particularly so in the best known Test Acts, as, for example, in the Corporation Act, were actually in their ultimate reach so inclusive in scope and so disastrous in burden and penalty (including perpetual imprisonment, praemunire, total property forfeiture, and even death) as to be conditions on *existence*, not upon civil office or emoluments alone. And particularly was this so as to *churches*, and church officers and ministers, as distinct from lay individuals only. An evident (and ultimately very naked) purpose of the oaths was to destroy, could such be done, all churches and institutions of religious opinion—and hence their leaders—which would not subordinate their doctrines and forms to civil control and dictate. Many of the test statutes, as for example the statute imposing the Jacobean Oath discussed above, fell not only on office seekers but on all persons whatever over the age of eighteen years. (See the

enlargement of the persons required to take that oath imposed by the subsequent statute, 7 Jac. I, c. 6, 7 Stats at Large 227, 228, discussed in 28 Cath. Hist. Rev. 159, 172.) Conversely, many of the statutes fell with particularly heavy hand and application upon ministers *as such*, as for example the Five Mile Act, 17 Car. II, c. 2, and the statute directed at the Quakers, entitled, "An Act for Preventing the Mischiefs and Dangers that may Arise by Certain Persons Called Quakers and Others, Refusing to Take Lawful Oaths," 13 and 14 Car. II, c. 1, which fell on Quakers as a religious grouping alone and by name (8 Statutes at Large 32.)

Moreover, on the direct subject at issue at bar, the imposing of a tax burden or discrimination based on refusal out of religious opinion and conscience to take a civil oath of supremacy, there is *exact* historical example in the Test Oath Statutes. The Statute in 9 George I, c. 18, appearing in 15 Statutes at Large 70, is entitled, "An Act for Granting An Aid to His Majesty by Laying a Tax upon Papists, and for Making Such Other Persons, as Upon Due Summons Shall Refuse to Neglect to Take the Oath Herethen Mentioned, to Contribute Towards the Said Tax . . .". That statute laid a special tax directly and without other cause or foundation upon all persons who prior to its enactment had refused, and who after its enactment should continue to refuse, to take the religious test oaths contained in a number of designated and interrelated prior Test Acts, including specifically 1 George I, Stat. 2, c. 55, 13 Statutes at Large 312, referring in turn to the statutes and oaths in 1 George I, Stat. 2, c. 13, 13 Statutes at Large 187, 189, and 30 Car. II, Stat. 2, c. 1, 8 Statutes at Large 427, 430, referring to and adopting the oath imposed in the Test Act

of 1672, in 25 Car. II, c. 2, which imposed a force and violence oath in the exact terms of the Jacobean Oath quoted in full earlier in this discussion. The rationale attempting to justify a special tax laid on oath-refusers in the statute discussed above, 9 George I, c. 18, was the very rationale urged in support of the California tax oath in the instant case, namely that persons declining to disavow advocacy or belief in force and violence represent burdensome tax expenses to the government to secure and maintain order and consequently should equitably bear a special tax burden. Thus in justification of the tax imposed in that statute it was recited therein that it had been taken as assumed that all oath-refusers of the prior test oaths "had all, or the greatest part of them, been concerned in stirring up and supporting the then late unnatural rebellion, by which they had brought a vast expense upon this nation, and that it manifestly appeared by their behavior, that they take themselves to be obliged, by the principles they profess, to be enemies to your Majesty and the present happy establishment, watching all opportunities of fomenting and stirring up new rebellions and disturbances within this Kingdom, and of inviting foreigners to invade it; and that it was highly reasonable that they should contribute a large share to all such extraordinary expenses, as were or should be brought upon this Kingdom by their treachery and instigation; and to the end that by paying largely to the great expenses which they had brought upon this nation, they might be deterred, if possible, from like offenses for the future, . . .". (9 George I, c. 18, 15 Statutes at Large 70.)

The debates in parliament on the passage of this statute are treated in Volume VIII, Cobett's, "Parliamentary History of England", pages 354-365 and again at pages

51-52. The rationale of justifying such a special tax upon oath-refusers (called "nonjurors"), and upon "Papists", was in unmistakable manner laid upon a presumption that these persons were connected with religious advocacy of force and violence. At page 354 the scrivener observes of the opening debate in Commons, as follows: "The Gentlemen, who have spoken in favor of this Bill have urged, that . . . . the Roman Catholics have been more or less concerned in every conspiracy against the government; so that if they did not shew themselves in the late conspiracy, it was out of prudence, and not for want of zeal for the Pretenders' cause. They will not allow, that it is liable to the objection of not being supported with particular facts, but say, with great probability, that the Roman Catholics have made large contributions here at home, to send to the Pretender and his adherents abroad: and if they are in a capacity of supplying the necessities of their friends abroad, it is but very reasonable for them to contribute to the defraying of an expense that they have in a great measure, occasioned at home." Subsequently it is further observed: "Accordingly, after some debate, the Committee came to the following Resolution, viz. 'That towards raising the sum of 100,000 pounds granted to his Majesty, towards reimbursing to the public the great expenses occasioned by the late rebellions and disorders, to be raised and levied upon the real and personal estates of all Papists, an equal rate and proportion be raised and levied upon the real and personal estates of every other person, being of the age of eighteen years or upwards, *not having taken the oath of supremacy and allegiance, and the abjuration oath*, who shall upon due summons neglect or refuse to take the same.'" (Emphasis added.)

Additionally, all nonjurors, and recusants, and "papists", were by other statutes directly forfeited of two-thirds of all their real and personal property, and were incapacitated from either buying or inheriting land, unless they submitted to the test oaths, and on death their properties were forfeited by the Test Acts to their first of kin being a Protestant. (11 and 12 Will. III, c. 4; 1 George I, Stat. 2, c. 55, 13 Statutes at Large 312; II May's "Constitutional History of England", 176, f.n. 2.)

May comments as follows:

> "It [Act of 11 and 12 Will. III, c. 4] incapacitated every Roman Catholic from inheriting or purchasing land; unless he abjured his religion upon oath; and on his refusal, invested his property, during his life, in his next of kin, being a Protestant . . . Again, in 1722, the estates of Roman Catholics and nonjurors were made to bear a special financial burden, not charged upon other property. [Referring to 9 George I, c. 18]."
>
> —II May's, "Constitutional History of England", pp. 176-177.

Of course, tax and property burdens were not the sole measure of the penalties imposed. Coercive imprisonment, even perpetual, might accompany it; and sometimes banishment and abjuration of the realm was imposed. Speaking of the Jacobean Oath, it is noted in 28 Cath. Hist. Rev. 159, 180 that certain nonjurors under that Act were "condemned to perpetual imprisonment and [to] utter shipwreck of lands and goods for refusing this oath." And Quakers, under the statute previously cited, were subject on third offense for refusing test oaths to perpetual banishment, in addition to property forfeiture and imprisonment.

These are examples of the compelling historical material showing the applicability of the English test oath period to the California oath at bar. The material accords well with religious principle. It is directly controlling in Constitutional law and under our Bill of Rights since the Supreme Court has expressly and aptly observed that under the First Amendment, "The test oath is abhorrent" to our Constitution. (*Girouard v. United States*, 328 U. S. 61, 69.)

In addition to the materials mentioned above a valuable secondary treatment of test oaths appears in an article entitled, "Test Oaths: Henry VIII to the American Bar Association" in XI Lawyers Guild Review, pages 111-127. Further, a rare book with much contemporaneous material entitled, "A Summary of Penal Laws as to Nonjurors, Papists, Popish Recusants and Non-Conformists" collects most if not all of the statutes imposing Test Oaths during the period from the beginning of the reign of Elizabeth, in 1558, through the year 1716. This book makes particularly evident the overwhelming reach of the combined, interrelated terms of the hundreds of test statutes enacted, and the crushing scope of the combined penalties thereof, reaching to property, tax, jail, praemunire and even death.

It is true that the English oaths in many instances intruded directly into religious creed and sought to exert direct control over the form and content of creed and belief *in se*, as, e.g., by requiring denial of belief in transsubstantiation (many examples) or compelling declaration of belief in "all and everything" contained in the Church of England Book of Common Prayer. (14 Car. II, c. 4.) Thus control of religious content directly and, in ultimate, totally, was the evident final purpose and objective of the English test oaths, above and beyond the

features discussed above as to renunciation of force and violence and renunciation of support of a foreign power in the event of war. But it is unmistakably evident and plain from English history that these latter features were not mere incidentals of the English test oath programs in history but were to the contrary central and even *emphasized* components thereof, and moreover, that it was largely upon a rationale rested directly upon those very features that the final end of compelling civil authority over direct creed and content was attempted and defended. Hence these characteristics were *basic* to the English oaths in every sense and manner of evaluation, and were blood and bone of the struggle for religious freedom engendered by exaction of the oaths; it cannot be doubted that rejection of the English Test Oaths by the First Amendment encompassed rejection equally of the dominant and central features of such oaths discussed herein.

APPENDIX C.

Excerpt From California Constitution, Article IV, Section 1.

California Senate Bill 202 (1957 Legislature; West's 1957 California Legislative Service p. 5).

Article IV, section 1 of the California Constitution provides:

"No act passed by the Legislature shall go into effect until 90 days after the final adjournment of the session of the Legislature which passed such act, except . . . urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house."

The 1957 excusing legislation (see f.n. 35, p. 33, *supra*), which is identical with that passed in 1955 save the years 1955 and 1956 were added, reads as follows:

"An act to amend Section 262 of the Revenue and Taxation Code, relating to the church exemption, and declaring the urgency thereof, to take effect immediately.

(Approved by Governor January 31, 1957.

Filed with Secretary of State January 31, 1957)

"The people of the State of California do enact as follows:

"Section 1. Section 262 of the Revenue and Taxation Code is amended to read:

"262.

"Any tax or penalty or interest thereon for any fiscal year commencing during the calendar year 1952, 1953, 1954, 1955 or 1956 on property as to which

the church exemption was available for such fiscal year shall be canceled pursuant to Article 1 (commencing with Section 4986) of Chapter 4 of Part 9 of this division as if it had been levied or charged erroneously, and, if paid, a refund thereof shall be made pursuant to Article 1 (commencing with Section 5096) of Chapter 5 of Part 9 of this division as if it had been erroneously collected.

"No amount shall be canceled or refunded pursuant to this section unless the person or organization otherwise entitled to such cancellation or refund has first complied with the provisions of Section 32 of this code, relating to the loyalty declaration.

"Sec. 2. This act is an emergency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

"Some churches have inadvertently failed to file the required affidavit in support of the tax exemption of their property which is granted by the State Constitution, and as a result now are confronted with obligations which, if met, *will substantially impair their ability to function effectively.* This act will remedy the situation by, in effect, removing the procedural bar to the application of the exemption to such property. In doing so, the public policy of the State as expressed in the Constitution will be entirely fulfilled and the State as a whole will benefit." (Italics added.)